

2003

# Sindy Holmstead v. Tony D. Holmstead : Brief of Appellant

Utah Court of Appeals

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Douglas L. Neeley; Attorney for Petitioner/Appellee.

Howard Chuntz; Attorney for Respondent/Appellant.

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IN THE SIXTH JUDICIAL DISTRICT COURT

COUNTY OF SEVIER, STATE OF UTAH

SINDY HOLMSTEAD,

Petitioner/Appellee,

v.

TONY D. HOLMSTEAD,

Civil No. 024600016

Respondent/Appellant.

\_\_\_\_\_ /

IN THE UTAH COURT OF APPEALS

Case No.20030248 – CA

BRIEF OF APPELLANT

APPEAL

APPEAL FROM SIXTH DISTRICT COURT, SEVIER COUNTY

JUDGE PAUL D. LYMAN

Douglas L. Neeley (#6290)  
Attorney for Petitioner/Appellee  
1<sup>st</sup> South Main, Suite 205  
P.O. Box 7  
Manti, Utah 84642

Howard Chuntz, (#4208)  
Attorney for Respondent/Appellant  
1149 West Center Street  
Orem, Utah 84057

Argument priority classification from Utah R. App. P.29(b)(15)

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1<sup>st</sup> South Main, Suite 205  
P.O. Box 7  
Manti, Utah 84642

Howard Chuntz, (#4208)  
Attorney for Respondent/Appellant  
1149 West Center Street  
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### OTHER AUTHORITIES:

None

## JURISDICTION

The Court of Appeals has jurisdiction in this matter pursuant to Section 78-2a-3(2)(h) of the Utah Code.

## STATEMENT OF ISSUES PRESENTED FOR REVIEW

- I. Did the trial court abuse its discretion and misapply the law when it gave petitioner a substantially greater portion of the marital property without there being a finding of unusual circumstances justifying the same.
- II. Did the trial court abuse its discretion and misapply the law by ordering respondent to pay alimony in an amount far and in excess of his ability to pay.
- III. Did the trial court abuse its discretion and misapply the law by ordering respondent to pay petitioner's attorney fees when there was no finding of fact nor evidence that respondent had the ability to pay.
- IV. The standard of appellate review is correction of abusive discretion, (Hall v. Hall, 858 P.2d 1018 (Utah App. 1993), Rehn v. Rehn, 974 P.2d 306 (Utah App. 1999), Munns v. Munns, 790 P.2d 116 (Utah App. 1990), and Shinokoskey v. Shinkoskey, 19 P.3d 1005 (Utah App. 2001)); and correction of error, Elman v. Elman, 45 P.3d 176 (Utah App. 2002), (Orton v. Carter, 970 P.2d 1254, (Utah 1998)).

## CONSTITUTIONAL PROVISIONS, STATUTES, ETC.

Utah Code Annotated Section 30-3-3 and 30-3-5(7).

## STATEMENT OF THE CASE

1. A Petition for Divorce was filed January 28, 2002 in the Sixth Judicial District Court of Sevier County.

2. Trial of the matter was held on November 7, 2002.
3. Findings of Fact, Conclusions of Law and a Decree of Divorce were entered January 6, 2003. (Copies are attached hereto as Exhibits "A" and "B" respectively).
4. Respondent filed a Motion to Alter or Amend the Decree of Divorce January 10, 2003.
5. An Order Denying respondent's Motion to Alter or Amend Decree of Divorce was entered January 29, 2003.
6. Respondent filed a Notice of Appeal February 24, 2003 from a final Order entered by the Sixth District Court, Sevier County.

#### STATEMENT OF FACTS

The facts set forth below are those found by the trial court in its Findings of Fact (see Exhibit "A"):

- a. The marriage between the parties is long term, having been married on November 27, 1976, in the City of Bountiful, State of Utah.
- b. The respondent's extramarital affair and abusive behavior have caused difficulties in the marriage that cannot be reconciled and have prevented the parties from pursuing a viable marriage relationship. The petitioner should be granted a divorce from the respondent, effective today.
- c. The parties' children have all reached their majority or have otherwise become emancipated.
- d. The appraised value of the marital home was \$103,500 which includes some, but not all of, the reasonable and necessary repairs. The appraiser, Mr. Stott, deducted



\$3,500 for these repairs. Mr. Thomas, a licensed contractor, testified that there was indeed \$5,448 in estimated repairs. The Court finds that an additional \$2,000 should be deducted from the appraised value of the home for these reasonable and necessary repairs, bringing the actual value of the marital home to be \$101,500.

e. The Syndicut has been the business of the petitioner's during the marriage. If appears to the Court that the petitioner has given as low a value as possible and the respondent has given as high a value as possible to the assets of the business. The petitioner testified the value to be \$4,558.50. The respondent testified the value to be \$9,340.00. The Court finds that the business is not worth either of the two values. The 1999 tax returns shows a loss of \$4,970 and the 2000 tax return shows a loss of \$13,901. The business is clearly a losing venture and the losses clearly exceed any value. The business should be liquidated. However, the Court is not going to order it to be sold because it is a source of income to the petitioner and the Court awards the business to her with no interest in the respondent.

f. The Court wants to divorce these parties and make it so they have as little to do with each other in regards to the marital assets as possible. For that reason, the Court has lumped the petitioner's savings account issue, the business checking account issue, and the division of proceeds from the mountain property sale together and finds the following to be a reasonable and fair division of those accounts:

i. The parties borrowed from their daughters', Ashley and Kacy's, savings accounts during the marriage to buy stock. Those debts have been repaid with funds from the home equity loan. The petitioner didn't like the purchase of stock with

borrowed money, but she went along with it anyway. The Court finds that the debt to buy stock from the home equity loan is a marital debt.

ii. The petitioner has a savings account at Mountain America Credit Union with a balance of \$11,000. The Court finds the petitioner's testimony to be credible as to the source of those funds; \$4,500 was transferred from her business account to pay for a tanning bed, \$3,000 was deposited over the months for Kacy and which does belong to Kacy. The remaining \$3,500 came from petitioner's checking account. The petitioner has now paid Kacy her \$3,000 from the account. The petitioner has a credit card debt of \$5,700 incurred for the most part to purchase the tanning bed for \$4,500. The remaining net to the petitioner from the savings account is \$2,300 which should be awarded to her free and clear of any interest in the respondent.

iii. The parties sold some mountain property and the respondent received \$11,000 from the sale proceeds and the petitioner received \$4,000, which shorts her \$3,500 from an equitable split.

iv. The petitioner has a balance of \$7,234 in her business account as of October 31, 2002. In reviewing the checking account activity, the account balance truly does fluctuate with a range in 2002 from a low of \$1,616 in February to a high of \$7,559 in June. The petitioner has testified that the account is used to pay ongoing business expenses and supplies, to pay her quarterly income taxes, and to pay her FICA for her employees. The Court finds her testimony credible and it seems to the Court that these are legitimate business expenses and if she didn't accumulate the large balances, that she

would have to have a line of credit with a lending institution to meet these ongoing business expenses.

g. Based on the foregoing, the Court then awards the respondent the \$3,500 difference from the sale of the mountain property, but awards the petitioner the \$2,300 as an off-set from the savings account. The petitioner is awarded all the assets of the Syndicut and business savings account balance. The Court specifically finds that such division is fair and reasonable and equitable.

h. In regards to the other personal property of the parties, neither party wanted certain items, to-wit: two (2) large gray boxes with dishes, rifle scope and case, Ruger with scope, air mattresses, chairs, sleeping bags, compound bow, hand-made fly rods, Ruger rifle, 33" deer mount, Savage shotgun combination, elk mount, deer mount (velvet), moose hide, bear rug, deer mounted, antelope mount, Englewood pole, Coleman stove, knife collection, 4-wheeler trailer, 4-wheeler and plow, braided rug, one (1) burner stove, two (2) large coolers, TeePee, Camp Chef, sheepherder stove, Coleman lantern, Ruger 1022, Ruger .06, Remington 32 Special, and camping equipment. The Court orders that these items should be sold now, no matter whose possession they are in and an accounting be provided to the other party, including proof of the sales price and purchaser. The parties should split the sales proceeds evenly. If the respondent wants any of the items, then he shall be obligated to pay the petitioner the value she has listed on her Exhibit No. 5 because the Court finds her values to be more reasonable.

i. The petitioner should be awarded all of the items of personal property on her Exhibit No. 3, except the big screen tv and the entertainment center, which should be

awarded to the respondent. The respondent should be awarded the remaining items on petitioner's Exhibit No. 5, except for those items listed above.

j. All remaining personal items should be awarded to the party that currently has them in their possession.

k. The 5<sup>th</sup> wheel trailer should remain in the care of the respondent and he is responsible for all debt associated therewith. The respondent should be ordered to sale the trailer, retire the debt, and apply all net proceeds towards the home equity debt. The trailer should be sold as soon as possible for as much as it can possibly bring.

l. The respondent should be awarded the new Ford diesel 4x4 pickup, together with all debt associated therewith. The Court specifically finds that at best, the purchase was foolish, but the Court is of the opinion that the respondent incurred this debt for the intentional purpose to gain an advantage in these divorce proceedings and lower his net income available for alimony purposes. The truck should be sold immediately and all net equity applied towards the home equity loan. If there is a deficiency after the sale, the respondent is solely responsible for the debt and he should hold the petitioner harmless therefrom.

m. After the respondent has retired the debts from the 5<sup>th</sup> wheel trailer and the Ford diesel truck, the parties are left with \$19,000 on the home equity loan. The Court specifically finds that this \$19,000 debt is a marital obligation and should be equally shared by the parties. The payment is \$300 per month and each party is ordered to pay \$150 per month until the debt is paid in full. Either party can pay their share of \$9,500 in advance, but neither party is to use the home equity line of credit from here on.

n. The petitioner is awarded the home and real property with the only encumbrance being the \$19,000 home equity loan. The respondent should quit claim his interest in the home immediately to the petitioner.

o. The respondent should be awarded a larger portion of his 401K and receive his portion of the home equity from those proceeds calculated as follows:

(1) Each party has \$50,750 of equity in the marital home after the \$19,000 home equity loan is paid. The respondent should receive the first \$60,250 from his 401K and the remaining balance split 50/50 between the parties. Said sum is the respondent's portion of his equity in the marital home.

p. If for any reason, including bankruptcy, the respondent fails to pay his portion of the home equity loan, then the petitioner is awarded that portion not paid from the respondent's 401K and the petitioner should be allowed to come back before the Court to modify this provision and change the distribution of the 401K. This division and order is meant to be bankruptcy proof. The petitioner is awarded the home and all the equity and the respondent is awarded the larger portion of his 401K so long as he satisfied his portion of the home equity loan.

q. The petitioner is awarded a portion of the respondent's other retirement, pension, or profit sharing plans from his place of employment and should be split pursuant to the Woodward formula. The respondent should prepare qualified domestic relation orders consistent with these findings.

r. In regards to the parties' incomes, it is undisputed that the petitioner earns \$1,100 per month. The petitioner has testified that she has \$2,092 in monthly expenses

and the respondent has suggested that some of the figures are inflated. However, it appears to the Court that the petitioner has in fact minimized her expenses on every account and the Court specifically finds \$2,092 to be reasonable monthly needs of the petitioner. The Court has further ordered her to pay \$150 per month towards the home equity loan which she didn't expect.

s. In order to help the petitioner attain the same standard of living she enjoyed during the marriage, the Court finds that she needs at least \$992 per month over and above her income. It is unrefuted that during the marriage, money worries were non-existent for the petitioner. Since the separation, the petitioner has been scrimping and saving in order to exist, which she shouldn't have to do. The petitioner is in need of at least \$992 to attain the same standard of living.

t. The respondent grosses \$5,387 per month and after taxes, the Court finds his net monthly income to be \$3,631. The respondent has listed monthly expenses, two (2) of which the Court finds are clearly excessive and unreasonable. The first is the truck payment of \$743 per month. The Court has previously found that the respondent incurred this expense in order to avoid paying alimony. The second unreasonable expense is the \$618 per month 401K loan payment which is clearly excessive. At that rate of payment, the loan would be paid off in a very short period of time. Extrapolating the respondent's analysis and suggestion of how the petitioner could borrow funds to pay the respondent's claimed equity from the home, the Court believes \$120 per month is a more reasonable payment and is in line with the respondent's suggested analysis. There is also a clear question in the Court's mind as to the real monthly payment owed on the

401K loan as the documents presented by the respondent suggest several figures.

Consequently, the Court finds that the \$120 payment on the 401K loan is a reasonable sum. The respondent is ordered to assume and hold the petitioner harmless from the 401K loan.

u. The respondent has incurred substantial credit card debt since the parties' separation. The respondent has suggested that he is responsible for that debt and the Court does order that he should pay that debt and hold the petitioner harmless therefrom.

v. After the respondent has sold the 5<sup>th</sup> wheel trailer and retired the debt, the Court finds that the respondent has reasonable and necessary monthly expenses of \$2,911 which includes the credit card payment. The Court reaches said sum using the following calculations: \$4,002 less \$743 auto payment, less \$498 401K loan payment, and less \$150 home equity loan payment. These expenses are taken from respondent's Exhibit No. 18 under the heading after 5<sup>th</sup> wheel sold. Subtracting the reasonable expenses from the respondent's take home pay leaves \$720 that he can pay towards alimony for the petitioner to help her monthly needs.

w. From the foregoing, the Court finds that \$720 per month for alimony is a reasonable amount which should be paid each month for the length of the marriage unless terminated earlier by remarriage or cohabitation. The respondent should pay 2/3's of this amount immediately, which represents the balance owed for the remainder of this month.

x. At the time of trial, petitioner's business had no major debts other than that owing for the tanning bed in the amount of \$3,500 (testimony of Cindy Holmstead in the record).

y. At the time of trial, the balance owing on the home equity loan was approximately \$50,300 of which \$28,425 was borrowed for the 5<sup>th</sup> wheel and the remainder was joint obligation debt (testimony of respondent in the record).

z. At the time of trial, the balance owing on the home equity loan was approximately \$50,300 of which \$28,425 was borrowed for the 5<sup>th</sup> wheel and the remainder was joint obligation debt (testimony of respondent in the record).

aa. At the time of trial, the 401K loan balance was approximately \$19,000 (testimony of respondent in the record).

#### SUMMARY OF ARGUMENT

1. Inequitable division of marital property. Generally each of the parties is entitled to one-half of the marital property unless the court finds exceptional circumstances supporting an unequal distribution. The trial court unequally divided the value of the marital home and retirement accounts, either because of a mathematical error or without properly finding that there were exceptional circumstances that warranted the unequal division of this property. The trial court's language clearly indicates that it had intended to divide this property equally, but its findings and order failed to do so.

The petitioner's business assets were also unequally divided without exceptional circumstances being found. Assets with value in excess of \$11,000.00 were awarded exclusively to petitioner without any division on the basis that the trial court believed the "losses exceeded value". Its findings were inconsistent with the evidence and testimony and not supported by any exceptional circumstance.



2. Award of alimony in excess of ability to pay. Without any evidence or testimony to support a finding that respondent could lower his 401K loan payment by \$498.00 per month, the trial court eliminated this much of respondent's debt obligation thereby increasing his available net monthly income artificially. All of the testimony and evidence presented at trial supported a finding that respondent could not lower this particular debt and despite what the trial court extrapolated as an amount that this loan payment could be reduced to, the reality was that respondent still was obligated to pay the full amount of the loan and did not have the funds imagined by the trial court to pay the amount of alimony ordered.

3. Award of attorney fees in absence of respondent's ability to pay. Before requiring a party to pay attorney's fees, a trial court must find that that party has the ability to pay them. Not only did the trial court not make such a finding, but in light of the fact that it required respondent to pay more money than he had as alimony certainly left him without any additional monthly income or other source of funds with which to pay petitioner's attorney fees.

#### ARGUMENT

##### A. Inequitable Division of Marital Property.

"Generally in a divorce proceeding, each party is presumed to be entitled to all of his or her separate property and 50% of the marital property." Bradford v. Bradford, 993 P.2d 887 (Utah App. 1999), (see also Hall v. Hall, 858 P.2d 1018 (Utah App. 1993)).

"An unequal division of marital property, however, is only justified when the Court memorializes in commendably detailed findings the exceptional circumstances

supporting the distribution.” Bradford v. Bradford, ibid (see also Thomas v. Thomas, 987 P.2d 603 (Utah App. 1999), Hall v. Hall, 858 P.2d 1018 (Utah App. 1993), and Burt v. Burt, 799 P.2d 1166 (Utah App. 1990)).

In the present case, the trial court made an unequal award of marital property with respect to its division of the marital home and respondent’s retirement accounts.

Respondent believes that the trial court intended to divide the value of the marital home and the retirement accounts equally, but made a mathematical error in calculating the division. When issuing its ruling regarding the home and the retirement, the trial court stated:

“Now, the house and the 401-K are going to be combined for purposes of getting you two ultimately divorced. The 401-K loan amount is going to be divided as well. First of all, the house is awarded to petitioner, okay, and the 401-K account is going to be divided, and I am going to go through how.

I am finding that the \$19,000.00 debt – that’s the loan on the 401-K account -- was a marital obligation. Each one consequently owed \$9,500.00 of the \$19,000.00. The respondent will receive his portion of the house’s equity by taking a larger portion of the 401-K asset.

The equity in the house, it – and this is where it gets complicated. Once the home equity loan is paid, then there is no obligation on this house, and both parties co-own it 50/50. Then each would be entitled to \$50,750.00.

The respondent is awarded the first \$50,750.00 of his 401-K. In addition to that, he’s awarded \$9,500.00 more dollars, which is petitioner’s portion of the debt that was borrowed from the 401-K. So he would get the first \$60,250.00 of the 401-K money. The balance is split 50/50, and the computation is done as of today.” (See Trial Transcript, page 214, lines 2-21 attached hereto as Exhibit “C”.)

Although the intent set forth in this passage is to give each of the parties one-half of the value of the home and the retirement, the actual dollar amounts used by the trial

court do not accomplish this. The trial court declares that “each would be entitled to \$50,750.00” and his/her half share of the value of the home. It then awarded petitioner the entire value of the home, \$101,500.00, but only awards respondent \$50,750.00 of the retirement before dividing the remainder, thereby shorting respondent \$50,750.00. Chart “A” below shows the division as ordered by the trial court and Chart “B” below demonstrates how respondent believes the trial court intended the division outcome.

#### CHART “A”

Petitioner	Respondent
\$101,500.00 (home) one-half balance of retirement	First \$50,750.00 (retirement) one-half balance of retirement
\$101,500.00, Total plus one-half balance of retirement	\$50,750.00, Total, plus one-half balance of retirement

#### CHART “B”

Petitioner	Respondent
\$101,500.00 (home) one-half balance of retirement	First \$101,500.00 (retirement) one-half balance of retirement
\$101,500.00, Total, plus one-half balance of retirement	\$101,500.00, Total, plus one-half balance of retirement

As can be seen in Chart “A”, petitioner’s total is \$50,750.00 more than respondent’s total. Chart “B” has each receiving the same total value of these assets as the trial court’s language indicated it was intending to accomplish. (Respondent is awarded an additional \$9,500.00 off the top from his retirement to offset petitioner’s one-half of the 401-K loan marital debt that respondent is required to pay in full).

In the alternative, if the division of the value of the home and retirement as set forth in the Decree was not a calculation error, then the trial court abused its discretion by unequally dividing these assets. No exceptional circumstances for an unequal distribution were argued by the petitioner, none were found by the trial court and respondent believes that none existed. Here, as in Hall, (ibid), “such an unequal distribution of the parties’ marital property makes no sense in the absence of findings justifying the decision.” Therefore, the trial court’s unequal division of the home and retirement should be remanded to correct the calculation error or correct its abuse of discretion and award respondent the first \$101,500.00 of retirement as an offset against petitioner’s receipt of the full \$101,500.00 of the marital home.

The assets of petitioner’s business are also unequally divided; all of it being awarded to petitioner. The trial court found that the parties believed that the assets of this business were worth between \$4,558.00 and \$9,340.00 (See Exhibit “A” Finding of Fact, paragraph 7). Despite the testimony of the parties, the trial court found that the “business is not worth either of the two values” and relied upon the 2000 and 2001 tax returns to find that the business is a “losing venture and the losses exceed value.” (See Exhibit “A” Finding of Fact, paragraph 7). The trial court also found that the business checking account had \$7,234.00 one week prior to the trial date which it awarded to petitioner because she needed this large accumulation of cash to pay ongoing business expenses. (See Exhibit “A” Finding of Fact, paragraph 9(d)).

The evidence and testimony at trial establish that, as of the date of trial the only business debt then existing was a credit card expense to pay for a tanning bed, and

supplies that come in and go out. (See Trial Transcript, page 85, line 25 through page 86, lines 1 through 5, attached hereto as Exhibit “D”). The trial court had already provided for the credit card/tanning bed debt in Finding of Fact paragraph 9(b) where it awarded petitioner the \$11,000.00 in her savings account, \$4,500.00 of which was to take care of this debt.

Because the business had no other, unaccounted for debt, there was nothing to offset against the value of the business assets. Therefore, the value that the parties placed on the assets, as well as the cash in the savings account had actual, unencumbered value that the trial court should not have discounted. Its reference to the year 2000 and 2001 tax return losses as an offset against current value is both improper accounting procedure because there was not current debt owing therefrom, and an abuse of discretion. The trial court recognized that it should have ordered the business assets liquidated, but chose not to because it was a source of income to petitioner (See Exhibit “A” Finding of Fact, paragraph 7). The trial court’s findings about the business assets are inconsistent and apply the financial facts regarding petitioner’s business inappropriately. The business assets have actual, unencumbered value that should have been divided equally between the parties rather than deciding that they had no value and awarding them exclusively to petitioner.

**B. Award of Alimony Beyond Respondent’s Ability to Pay.**

“In determining whether to award alimony and in setting the amount a trial court must consider the needs of the recipient spouse; the earning capacity of the recipient spouse; the ability of the obligor spouse to provide; . . .”. Rehn v. Rehn, 974 P.2d 306

(Utah App. 1999). “Failure to consider these factors constitutes an abuse of discretion resulting in reversal unless pertinent facts in the record are clear, uncontroverted, and capable of supporting only a finding in favor or the judgment.” Rehn, (ibid) citing Stevens v. Stevens, 754 P.2d 952 (Utah App. 1988) and Schaumberg v. Schaumberg, 875 P.2d 598 (Utah App. 1994).

In the present case, the trial court made proper findings with respect to the first two required factors set forth in Rehn (need and earning capacity of recipient spouse at findings of fact paragraphs 24 and 25), but failed to establish that respondent had the ability to pay support. In its Findings of Fact, paragraph 26, the Trial Court made findings that:

“The second unreasonable expense is \$618.00 per month 401-K loan payment which is clearly excessive. At that rate of payment, the loan would be paid off in a very short period of time. Extrapolating the respondent’s analysis and suggestion of how petitioner could borrow funds to pay respondent’s claimed equity from the home, the Court believes \$120.00 per month payment is more reasonable payment and is in line with respondent’s suggested analysis. There is also a clear question in the Court’s mind as to the real monthly payment owed on the 401-K loan as the documents presented by the respondent suggest several figures. Consequently, the Court finds that the \$120.00 payment on the 401-K loan is a reasonable sum. The respondent is ordered to assume and hold the petitioner harmless from the 401-K loan.” (See Exhibit “A”, Finding of Fact, paragraph 26).

The trial court abused its discretion when it made these findings because there was neither testimony nor other evidence admitted at trial to support them. The facts presented at trial were as follows:

a. The 401-K loan was a marital debt (See Exhibit “A”, Findings of Fact paragraph 9(a)).

b. Respondent testified that the 401-K monthly loan payment was \$618.00 per month. (See Trial Exhibit “18” attached hereto as Exhibit “E” and Trial Transcript page 138, lines 21 through 25 and page 139, lines 1 through 5 attached hereto as Exhibit “F”).

c. When respondent was asked by petitioner’s attorney if he could readjust the monthly payment of this loan, he responded by saying “no”. (See Trial Transcript page 139, lines 10 through 11 attached hereto as Exhibit “F”).

d. When the trial judge asked respondent if he could borrow money from another source and pay off the 401-K loan, respondent answered “no, I could not”. (See Trial Transcript page 140, lines 17 through 18 attached hereto as Exhibit “G”).

e. Trial Exhibit No. 28 shows that the interest on the 401-K loan is \$525.00 per month. (See page 2 of Trial Exhibit No. 28 attached hereto as Exhibit “H”).

Nothing in the testimony or evidence presented supports a finding that the loan payment is clearly excessive or that it can be reduced or refinanced to a lower amount, and particularly not to \$120.00 per month. In fact, the trial court was so concerned with respondent’s financial condition due to all of the debt respondent was ordered to pay that it refers to respondent’s potential for bankruptcy and refers to making the trial court’s orders “bankruptcy proof”. (See Exhibit “A”, Findings of Fact paragraph 22).

The trial court’s actual language on this issue was as follows:

“In addition, the 401-K loan payment of \$618 a month is clearly excessive. It will pay off the loan in a very short period of time. The respondent’s Counsel opined that the petitioner could go out and get a refinance of his – of the respondent’s \$50,000 share of the loan – of the value in the home at about \$300 a month or less.

Based on that opinion, extrapolating out the \$19,000 loan, the petitioner ought – the respondent ought to be able to get this \$19,000 refinanced at roughly \$120 a month or something like that. Now, I don't know whether he can actually do it or not, but that's what they propose, and I think \$120 a month to pay off that is far more reasonable than the \$618 a month.

There also is a clear question in the Court's mind of whether or not the payment is \$308 per month. When I look at that last document that was introduced, I think its \$308 a month. However, I know that the respondent – and I respect your difference. He claims it's the higher amount.

In any case, he's ordered to work some – either go get a loan from somebody else and pay that \$19,000 off, or to work something out with his own 401-K. He can do it whichever way he feels like, but it's to be refinanced and he's to reduce that amount.

Consequently, if we do that, I use the column that he has labeled “after the fifth wheel sold” column on his Exhibit 18 – now, that includes \$400 a month he's paying towards these credit card debts, and I'm awarding him all the credit card debt that he said that he would be willing to pay that were his. That means we take off the \$743 truck payment we take the \$618 401-K payment. We add to it the \$120 a month 401-K refinance payment, and the \$150 a month home equity payment. His expenses then become \$2,911.

When I deduct \$2,911 from \$3,631, which is his income after taxes, the amount that he can pay towards alimony is \$720 a month. As I said, I think here expenses were very reasonable, and I fiddled with hers. I'm going to order him to pay the \$720 a month as alimony in this particular case.” (See Trial Transcript page 216, lines 23 through page 218, line 9, attached hereto as Exhibit “I”).

The trial court cited the opinion that respondent's counsel made in closing arguments about how petitioner could obtain a loan against the residence and “extrapolated” that opinion to find that respondent “ought to be able to get this \$19,000.00 refinanced at roughly \$120.00 per month or something like that”. This use of counsel's opinion during closing argument and extrapolation are in improper basis for making findings and are not to be used in place of actual evidence. The actual evidence at trial was that respondent was paying \$618.00 per month on the 401-K loan, \$525.00 of



which was interest. The principal payment was, therefore, only \$93.00 per month (\$618.00 minus \$525.00 equals \$93.00). There is no reasonable way that the trial court could have concluded that the loan balance of \$19,000.00 could be paid off in a very short period of time with this interest to principal payment ratio.

Neither party offered testimony that the loan could be paid off in a short period of time or refinanced, and particularly not to such a low monthly payment. Respondent testified twice in response to questions from petitioner's attorney and the trial judge that he couldn't readjust the loan amount and couldn't borrow money from another source to pay off this loan.

The trial court knew that respondent's 401-K loan obligation was \$618.00 per month, knew that respondent didn't believe he could reduce that amount, was concerned that respondent was bankruptcy prone and had no idea how respondent could reduce the loan payment to \$120.00 per month. The trial court ignored these facts and just eliminated \$498.00 per month of respondent's debt associated with the 401-K loan payment, thereby finding that respondent had an extra \$498.00 of disposable income with which to pay alimony. This was an abuse of discretion and respondent's alimony obligation should be recalculated after subtracting from his net monthly income the \$498.00 of actual debt.

C. Award of Attorney Fees in Absence of Respondent's Ability to Pay.

"A trial court may award costs and attorney fees in divorce and modification proceedings." Wilde v. Wilde, 969 P.2d 438 (Utah App. 1998). "However, the award or denial of such fees must be based on evidence of the financial need of the receiving

spouse, the ability of the other spouse to pay, and the reasonableness of the requested fees.” Wilde v. Wilde, (ibid), citing Bell v. Bell, 810 P.2d 489 (Utah App. 1991).

“Failure to consider these factors is grounds of reversal on the fee issue.” Wilde v. Wilde, (ibid), citing Marshall v. Marshall, 915 P.2d 508 (Utah App. 1996).

In the present case, the trial court at Findings of Fact no. 35 properly found that petitioner had a financial need for her attorney fees to be paid. It made no reference to the reasonableness of these fees. More importantly, the trial court made no reference to respondent’s ability to pay these fees other than to reference respondent’s gross monthly income. Respondent contends that the evidence presented at trial and the trial court’s prior award of alimony establishes that he did not have the ability to pay petitioner’s attorney fees.

The trial court found that respondent’s net monthly income was \$3,631.00 (see Exhibit “A”, Findings of Fact, paragraph 26). The trial court, after not allowing most of two of respondent’s expenses in the sum of \$1,241.00 per month, because it found them to be excessive and unreasonable (see Exhibit “A”, Finding of Fact paragraph 26) concluded that respondent’s reasonable monthly living expenses equal \$2,911.00 (see Exhibit “A”, Finding of Fact paragraph 28). The difference between the net monthly income and reasonable monthly expenses is \$720.00. This amount was awarded to petitioner as alimony leaving respondent with no additional funds to pay attorney fees and still having to come up with an additional \$1,241.00 per month for the disallowed, but actual monthly debt.

Based upon the foregoing, the trial court abused its discretion by ordering respondent to pay petitioner's attorney fees when it failed to make proper findings of fact. In particular, the evidence and the trial court's other findings and other awards preclude a finding that respondent had the ability to pay. The evidence establishes clearly that respondent is without the ability to pay petitioner's attorney fees.

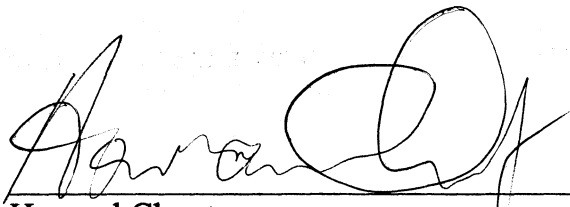
### CONCLUSION

Because the trial court has either mistakenly or without finding exceptional circumstances unequally divided the parties' marital property, the award made for the home, retirement accounts and business assets must be reversed and remanded for correction of error or additional findings supporting its conclusions.

Because the trial court improperly inflated respondent's net monthly income to establish that he had an ability to pay a greater amount of alimony, the award of alimony must be reversed and appropriate findings made to establish the correct amount of respondent's income and an appropriate amount of alimony.

Finally, because the trial court failed to make any findings that respondent had the ability to pay petitioner's attorney fees and because the evidence presented at trial made it clear that respondent did not have the ability to pay those fees, the award of attorney fees must be reversed.

DATED June 27, 2003.



Howard Chuntz  
Attorney for Respondent/Appellant

MAILING CERTIFICATE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed,  
postage prepaid, this 1st day of ~~June~~<sup>July</sup>, 2003, to the following:

Douglas L. Neeley  
Attorney for Petitioner/Appellee  
1<sup>st</sup> South Main, Suite 205  
P.O. Box 7  
Manti, UT 84642



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## **ADDENDUM**

**EXHIBIT “A”**

**FINDINGS OF FACT & CONCLUSIONS OF LAW**

DOUGLAS L. NEELEY 6290  
Attorney for Petitioner  
1<sup>st</sup> South Main, Suite 205  
P.O. Box 7  
Manti, Utah 84642  
Telephone: (435)835-5055  
Facsimile: (435)835-5057

IN THE SIXTH JUDICIAL DISTRICT COURT OF SEVIER COUNTY

STATE OF UTAH

---

SINDY HOLMSTEAD	:	FINDINGS OF FACT & CONCLUSIONS OF LAW
Petitioner,	:	
	:	Civil No. 024600016
vs.	:	
TONY D. HOLMSTEAD	:	JUDGE PAUL D. LYMAN
Respondent.	:	

---

The above-entitled matter came on for hearing on the 7<sup>th</sup> day of November, 2002, before the Honorable Judge Paul D. Lyman. Petitioner appeared in person and was represented by her attorney, Douglas L. Neeley. Respondent appeared in person and was represented by his attorney, Howard Chuntz. The parties, having been sworn and having testified in support of their pleadings, the Court having heard argument of counsel, and being otherwise fully advised in the premises, now makes  
  
and enters its:

### **FINDINGS OF FACT**

1. Both Petitioner and Respondent are bona fide residents of Sevier County, State of Utah, and have been for three months immediately prior to the filing of this action.
2. The marriage between the parties is long term, having been married on November 27, 1971, in the City of Bountiful, State of Utah.
3. The Respondent's extramarital affair and abusive behavior have caused difficulties in the marriage that cannot be reconciled and have prevented the parties from pursuing a viable marriage relationship. The Petitioner should be granted a divorce from the Respondent, effective today.
4. The Respondent should be permanently enjoined against and restrained from bothering, calling, harassing, annoying, threatening or harming the Petitioner at her residence, business, or any other place. The Respondent should not be allowed to go to or be upon the Petitioner's property or at her place of employment. Any appropriate peace officer should be directed to render any necessary assistance to carry out the Restraining Order here and above provided for. Further, violation of any of the provisions mentioned



herein should be deemed contemptuous, and the violating party should be punished accordingly.

5. The parties' children have all reached their majority or have otherwise become emancipated.

6. The appraised value of the marital home was \$103,500 which includes some, but not all of, the reasonable and necessary repairs. The appraiser, Mr. Stott, deducted \$3,500 for these repairs. Mr. Thomas, a licensed contractor, testified that there was indeed \$5,448 in estimated repairs. The Court finds that an additional \$2,000 should be deducted from the appraised value of the home for these reasonable and necessary repairs, bringing the actual value of the marital home to be \$101,500.

7. The Syndicut has been the business of the Petitioner's during the marriage. It appears to the Court that the Petitioner has given as low a value as possible and the Respondent has given as high a value as possible to the assets of the business. The Petitioner testified the value to be \$4,558.50. The Respondent testified the value to be \$9,340. The Court finds that the business is not worth either of the two values. The 1999 tax returns shows a loss of \$4,970 and the 2000 tax return shows a loss of \$13,901. The

business is clearly a losing venture and the losses clearly exceed any value. The business should be liquidated. However, the Court is not going to order it to be sold because it is a source of some income to the Petitioner and the Court awards the business to her with no interest in the Respondent.

8. The Respondent testified that the Petitioner had cheated on her business expenses when filing her income tax returns, yet he has asked the Court to postpone the actual divorce date in order to allow the parties to file a joint tax return for 2002. If the Court believed the Respondent, the Court would be allowing the Respondent to participate in a fraud. However, the Court thinks it's a bunch of baloney and the Respondent should not want to file a return with the Petitioner if he really thinks she's cheating. Because the Court is granting the divorce as of today, the IRS code will not allow a joint return.

9. The Court wants to divorce these parties and make it so they have as little to do with each other in regards to the marital assets as possible. For that reason, the Court has lumped the Petitioner's savings account issue, the business checking account issue, and the division of proceeds from the mountain property sale together and finds the following to be a reasonable and fair division of those accounts:

a. The parties borrowed from their daughters', Ashley and Kacy's, savings accounts during the marriage to buy stock. Those debts have been repaid with funds from the home equity loan. The Petitioner didn't like the purchase of stock with borrowed money, but she went along with it anyway. The Court finds that the debt to buy stock from the home equity loan is a marital debt.

b. The Petitioner has a savings account at Mtn. America Credit Union with a balance of \$11,000. The Court finds the Petitioner's testimony to be credible as to the source of those funds; \$4,500 was transferred from her business account to pay for a tanning bed, \$3,000 was deposited over the months for Kacy and which does belong to Kacy. The remaining \$3,500 came from the Petitioner's checking account. The Petitioner has now paid Kacy her \$3,000 from the account. The Petitioner has a credit card debt of \$5,700 incurred for the most part to purchase the tanning bed for \$4,500. The remaining net to the Petitioner from the savings account is \$2,300 which should be awarded to her free and clear of any interest in the Respondent.

c. The parties sold some mountain property and the Respondent received \$11,000 from the sale proceeds and the Petitioner received \$4,000, which shorts her \$3,500 from an equitable split.

d. The Petitioner has a balance of \$7,234 in her business account as of October 31, 2002. In reviewing the checking account activity, the account balance truly does fluctuate with a range in 2002 from a low of \$1,616 in February to a high of \$7,559 in June. The Petitioner has testified that the account is used to pay ongoing business expenses and supplies, to pay her quarterly income taxes, and to pay her FICA for her employees. The Court finds her testimony credible and it seems to the Court that these are legitimate business expenses and if she didn't accumulate the large balances, that she would have to have a line-of-credit with a lending institution to meet these ongoing business expenses.

10. Based on the foregoing, the Court then awards the Respondent the \$3,500 difference from the sale of the mountain property, but awards the Petitioner the \$2,300 as an off-set from the savings account. The Petitioner is awarded all the assets of the Syndicut and business savings account balance. The Court specifically finds that such a division is fair and reasonable and equitable.

11. In regards to the parties' Winnebago, the Court accepts the Petitioner's testimony that the vehicle has been sold for approximately the cost of the repairs. Consequently, the Court finds that the value received against the cost of repairs is a wash and neither party receives any value.

12. The Petitioner should be awarded her Sable vehicle with a value of \$5,000. The Respondent should be awarded his 1990 pickup truck and shell with a like value of \$5,000.

13. In regards to the other personal property of the parties, neither party wanted certain items, to-wit: two (2) large gray boxes with dishes, rifle scope and case, Ruger with scope, air mattresses, chairs, sleeping bags, compound bow, hand-made fly rods, Ruger rifle, 33" deer mount, Savage shotgun combination, elk mount, deer mount (velvet), moose hide, bear rug, deer mounted, antelope mount, Englewood pole, Coleman stove, knife collection, 4-wheeler trailer, 4-wheeler and plow, braided rug, one (1) burner stove, two (2) large coolers, TeePee, Camp Chef, sheepherder stove, Coleman lantern, Ruger 1022, Ruger .06, Remington 32 Special, and camping equipment. The Court orders that these items should be sold now, no matter whose possession they are in and an accounting be provided to the other party, including proof of the sales price and purchaser. The parties should split the

sales proceeds evenly. If the Respondent wants any of the items, then he shall be obligated to pay the Petitioner the value she has listed on her Exhibit No. 5 because the Court finds her values to be more reasonable.

14. The Petitioner should be awarded all of the items of personal property on her Exhibit No. 3, except the big screen TV and the entertainment center, which should be awarded to the Respondent. The Respondent should be awarded the remaining items on Petitioner's Exhibit No. 5, except for those items listed above.

15. There has been testimony that a ruby diamond ring is missing. If it resurfaces, it is to be sold and the proceeds split 50/50.

16. All remaining personal items should be awarded to the party that currently has them in their possession.

17. The 5<sup>th</sup> wheel trailer should remain in the care of the Respondent and he is responsible for all debt associated therewith. The Respondent should be ordered to sale the trailer, retire the debt, and apply all net proceeds towards the home equity debt. The trailer should be sold as soon as possible for as much as it can possibly bring.

18. The Respondent should be awarded the new Ford diesel 4x4 pickup, together with all debt associated therewith. The Court specifically finds that at best, the purchase was foolish, but the Court is of the opinion that the Respondent incurred this debt for the intentional purpose to gain an advantage in these divorce proceedings and lower his net income available for alimony purposes. The truck should be sold immediately and all net equity applied towards the home equity loan. If there is a deficiency after the sale, the Respondent is solely responsible for the debt and he should hold the Petitioner harmless therefrom.

19. After the Respondent has retired the debts from the 5<sup>th</sup> wheel trailer and the Ford diesel truck, the parties are left with \$19,000 on the home equity loan. The Court specifically finds that this \$19,000 debt is a marital obligation and should be equally shared by the parties. The payment is \$300 per month and each party is ordered to pay \$150 per month until the debt is paid in full. Either party can pay their share of \$9,500 in advance, but neither party is to use the home equity line of credit from here on.

20. The Petitioner is awarded the home and real property with the only encumbrance being the \$19,000 home equity loan. The Respondent should quit claim his interest in the home immediately to the Petitioner.

21. The Respondent should be awarded a larger portion of his 401K and receive his portion of the home equity from those proceeds calculated as follows:

a. Each party has \$50,750 of equity in the marital home after the \$19,000 home equity loan is paid. The Respondent should receive the first \$60,250 from his 401K and the remaining balance split 50/50 between the parties. Said sum is the Respondent's portion of his equity in the marital home.

22. If for any reason, including bankruptcy, the Respondent fails to pay his portion of the home equity loan, then the Petitioner is awarded that portion not paid from the Respondent's 401K and the Petitioner should be allowed to come back before the Court to modify this provision and change the distribution of the 401K. This division and order is meant to be bankruptcy proof. The Petitioner is awarded the home and all the equity and the Respondent is awarded the larger portion of his 401K so long as he satisfies his portion of the home equity loan.



23. The Petitioner is awarded a portion of the Respondent's other retirement, pension, or profit sharing plans from his place of employment and should be split pursuant to the Woodward formula. The Respondent should prepare qualified domestic relation orders consistent with these findings.

24. In regards to the parties' incomes, it is undisputed that the Petitioner earns \$1,100 per month. The Petitioner has testified that she has \$2,092 in monthly expenses and the Respondent has suggested that some of the figures are inflated. However, it appears to the Court that the Petitioner has in fact minimized her expenses on every account and the Court specifically finds \$2,092 to be reasonable monthly needs of the Petitioner. The Court has further ordered her to pay \$150 per month towards the home equity loan which she didn't expect.

25. In order to help the Petitioner attain the same standard of living she enjoyed during the marriage, the Court finds that she needs at least \$992 per month over and above her income. It is unrefuted that during the marriage, money worries were non-existent for the Petitioner. Since the separation, the Petitioner has been scrimping and saving in order

to exist, which she shouldn't have to do. The Petitioner is in need of at least \$992 to attain the same standard of living.

26. The Respondent grosses \$5,387 per month and after taxes, the Court finds his net monthly income to be \$3,631. The Respondent has listed monthly expenses, two (2) of which the Court finds are clearly excessive and unreasonable. The first is the truck payment of \$743 per month. The Court has previously found that the Respondent incurred this expense in order to avoid paying alimony. The second unreasonable expense is the \$618 per month 401K loan payment which is clearly excessive. At that rate of payment, the loan would be paid off in a very short period of time. Extrapolating the Respondent's analysis and suggestion of how the Petitioner could borrow funds to pay the Respondent's claimed equity from the home, the Court believes \$120 per month payment is a more reasonable payment and is in line with the Respondent's suggested analysis. There is also a clear question in the Court's mind as to the real monthly payment owed on the 401K loan as the documents presented by the Respondent suggest several figures. Consequently, the Court finds that the \$120 payment on the 401K loan is a reasonable sum. The Respondent is ordered to assume and hold the Petitioner harmless from the 401K loan.

27. The Respondent has incurred substantial credit card debt since the parties' separation. The Respondent has suggested that he is responsible for that debt and the Court does order that he should pay that debt and hold the Petitioner harmless therefrom.

28. After the Respondent has sold the 5<sup>th</sup> wheel trailer and retired the debt, the Court finds that the Respondent has reasonable and necessary monthly expenses of \$2,911 which includes the credit card payment. The Court reaches said sum using the following calculations: \$4,002 less \$743 auto payment, less \$498 401K loan payment, and less \$150 home equity loan payment. These expenses are taken from the Respondent's Exhibit No. 18 under the heading after 5<sup>th</sup> wheel sold. Subtracting the reasonable expenses from the Respondent's take home pay leaves \$720 that he can pay towards alimony for the Petitioner to help her monthly needs.

29. From the foregoing, the Court finds that \$720 per month for alimony is a reasonable amount which should be paid each month for the length of the marriage unless terminated earlier by remarriage or cohabitation. The Respondent should pay 2/3's of this amount immediately, which represents the balance owed for the remainder of this month.

30. The parties also have accumulated an interest in some mountain real property. The same should be sold immediately and the proceeds split equally between the parties.

31. The sales of the truck and 5<sup>th</sup> wheel trailer should be subject to review by the Petitioner as well as the sales of the other personal property by either party. The sales should be fair and reasonable and arm length transactions.

32. The Petitioner has income of \$1,100 per month compared to the Respondent's \$5,300 per month. Clearly, the Petitioner does not have the ability to pay all of her attorney's fees and costs. The Petitioner should be awarded judgment against the Respondent in the sum of \$3,500 to help pay her attorney's fees. This sum takes into account the \$1,500 she has already paid against the \$4,500 owed. Said judgment should accrue interest at the statutory rate until paid in full.

33. Each party should be ordered to execute and deliver to the other such documents as are required to implement the provisions of the Decree of Divorce entered by the Court.

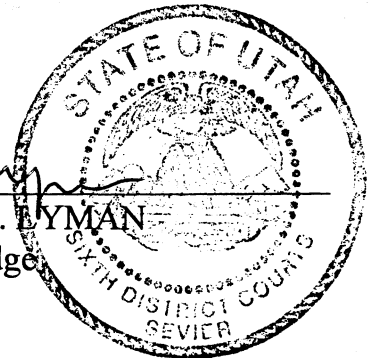
34. Should either party fail to abide by the provisions of a Decree of Divorce issued herein, that party should be liable for indemnification of the other, including attorney's fees and Court costs incurred in the enforcement of the Decree of Divorce.

### CONCLUSIONS OF LAW

1. This Court has jurisdiction over the parties in the above-entitled matter, and the parties are entitled to a divorce on the grounds of irreconcilable differences.
2. The parties should be awarded a Decree of Divorce, to become absolute and final the date of hearing in this matter.
3. The Court concludes that all other issues of dispute have been resolved by the Court pursuant to the above Findings of Fact.

DATED this 6<sup>th</sup> day of January, 2003.

  
\_\_\_\_\_  
JUDGE PAUL D. LYMAN  
District Court Judge



**EXHIBIT "B"**

**DECREE OF DIVORCE**

SIXTH DISTRICT COURT

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DOUGLAS L. NEELEY 6290  
Attorney for Petitioner  
1<sup>st</sup> South Main, Suite 205  
P.O. Box 7  
Manti, Utah 84642  
Telephone: (435)835-5055  
Facsimile: (435)835-5057

IN THE SIXTH JUDICIAL DISTRICT COURT OF SEVIER COUNTY

STATE OF UTAH

---

SINDY HOLMSTEAD	:	DECREE OF DIVORCE
Petitioner,	:	Civil No. 024600016
vs.	:	
TONY D. HOLMSTEAD	:	JUDGE PAUL D. LYMAN
Respondent.	:	

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The above-entitled matter came on for hearing on the 7<sup>th</sup> day of November, 2002, before the Honorable Judge Paul D. Lyman. Petitioner appeared in person and was represented by her attorney, Douglas L. Neeley. Respondent appeared in person and was represented by his attorney, Howard Chuntz. The parties, having been sworn and having testified in support of their pleadings, the Court having heard argument of counsel, and being otherwise fully advised in the premises, and having entered its Findings of Fact & Conclusions of Law, now, therefore,

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED THAT:

1. The bonds of matrimony and the marriage contract heretofore existing by and between the Petitioner and Respondent be, and the same are hereby dissolved, and the Petitioner is hereby awarded a Decree of Divorce from Respondent, said Decree to become absolute and final, effective the date of hearing in this matter.
2. The Respondent is permanently enjoined against and restrained from bothering, calling, harassing, annoying, threatening or harming the Petitioner at her residence, business, or any other place. The Respondent is not allowed to go to or be upon the Petitioner's property or at her place of employment. Any appropriate peace officer is directed to render any necessary assistance to carry out the Restraining Order here and above provided for. Further, violation of any of the provisions mentioned herein will be deemed contemptuous, and the violating party will be punished accordingly.
3. The parties are ordered to file separate tax returns for the 2002 tax year.
4. The Respondent is awarded the \$3,500 difference from the sale of the mountain property, but awards the Petitioner the \$2,300 as an off-set from the savings account. The Petitioner is awarded all the assets of the Syndicut and business savings account balance with no interest in the Respondent.



5. The Petitioner is awarded her Sable vehicle and the Respondent is awarded his 1990 pickup truck and shell.

6. In regards to the other personal property of the parties, neither party wanted certain items, to-wit: two (2) large gray boxes with dishes, rifle scope and case, Ruger with scope, air mattresses, chairs, sleeping bags, compound bow, hand-made fly rods, Ruger rifle, 33" deer mount, Savage shotgun combination, elk mount, deer mount (velvet), moose hide, bear rug, deer mounted, antelope mount, braided rug, Englewood pole, Coleman stove, knife collection, 4-wheeler trailer, 4-wheeler and plow, one (1) burner stove, two (2) large coolers, TeePee, Camp Chef, shepherd stove, Coleman lantern, Ruger 243, Ruger 1022, Ruger .06, Remington 32 special, and camping equipment. The Court orders that these items are to be sold now, no matter whose possession they are in and an accounting be provided to the other party, including proof of the sales price and purchaser. The parties are ordered to split the sales proceeds evenly. If the Respondent wants any of the items, then he is obligated to pay the Petitioner the value she has listed on her Exhibit No. 5.

7. The Petitioner is awarded all of the items of personal property on her Exhibit No. 3, except the big screen TV and the entertainment center, which are awarded to the

Respondent. The Respondent is awarded the remaining items on Petitioner's Exhibit No. 5, except for those items listed above.

8. If the ruby diamond ring resurfaces, it is to be sold and the proceeds split 50/50.

9. All remaining personal items are awarded to the party that currently has them in their possession.

10. The 5<sup>th</sup> wheel trailer is to remain in the care of the Respondent and he is responsible for all debt associated therewith. The Respondent is ordered to sale the trailer, retire the debt, and apply all net proceeds towards the home equity debt. The trailer is to be sold as soon as possible for as much as it can possibly bring.

11. The Respondent is awarded the new Ford diesel 4x4 pickup, together with all debt associated therewith. The truck is to be sold immediately and all net equity applied towards the home equity loan. If there is a deficiency after the sale, the Respondent is solely responsible for the debt and he is ordered to hold the Petitioner harmless therefrom.

12. After the Respondent has retired the debts from the 5<sup>th</sup> wheel trailer and the Ford diesel truck, the parties are left with \$19,000 on the home equity loan which debt is a marital obligation and is ordered to be equally shared by the parties. The payment is \$300 per month and each party is ordered to pay \$150 per month until the debt is paid in full. Either

party can pay their share of \$9,500 in advance, but neither party is to use the home equity line of credit from here on.

13. The Petitioner is awarded the home and real property with the only encumbrance being the \$19,000 home equity loan. The Respondent is ordered to quit claim his interest in the home immediately to the Petitioner.

14. The Respondent is awarded a larger portion of his 401K and receive his portion of the home equity from those proceeds calculated as follows:

a. Each party has \$50,750 of equity in the marital home after the \$19,000 home equity loan is paid. The Respondent is to receive the first \$60,250 from his 401K and the remaining balance split 50/50 between the parties. Said sum is the Respondent's portion of his equity in the marital home.

15. If for any reason, including bankruptcy, the Respondent fails to pay his portion of the home equity loan, then the Petitioner is awarded that portion not paid from the Respondent's 401K and the Petitioner will be allowed to come back before the Court to modify this provision and change the distribution of the 401K. This division and order is meant to be bankruptcy proof. The Petitioner is awarded the home and all the equity and the

Respondent is awarded the larger portion of his 401K so long as he satisfies his portion of the home equity loan.

16. The Petitioner is awarded a portion of the Respondent's other retirement, pension, or profit sharing plans from his place of employment and is to be split pursuant to the Woodward formula. The Respondent is ordered to prepare qualified domestic relation orders consistent with the findings entered herein.

17. The Respondent is ordered to assume and hold the Petitioner harmless from the 401K loan.

18. The Respondent is ordered to pay his credit card debt and hold the Petitioner harmless therefrom.

19. The Respondent is ordered to pay to the Petitioner a sum of \$720 per month for alimony which is to be paid each month for the length of the marriage unless terminated earlier by remarriage or cohabitation. The Respondent is ordered to pay 2/3's of this amount immediately, which represents the balance owed for the remainder of this month.

20. The parties also have accumulated an interest in some mountain real property. The same is to be sold immediately and the proceeds split equally between the parties.


21. The sales of the truck and 5<sup>th</sup> wheel trailer is subject to review by the Petitioner as well as the sales of the other personal property by either party. The sales are to be fair and reasonable and arm length transactions.

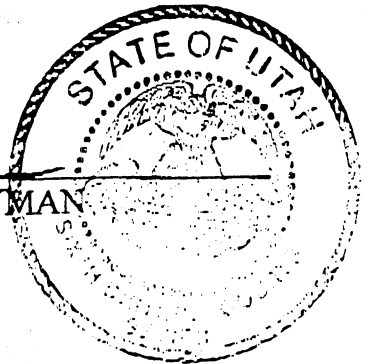
22. The Petitioner is awarded judgment against the Respondent in the sum of \$3,500 to help pay her attorney's fees. Said judgment will accrue interest at the statutory rate until paid in full.

23. Each party is ordered to execute and deliver to the other such documents as are required to implement the provisions of the Decree of Divorce entered by the Court.

24. Should either party fail to abide by the provisions of a Decree of Divorce issued herein, that party will be liable for indemnification of the other, including attorney's fees and Court costs incurred in the enforcement of the Decree of Divorce.

DATED this 6<sup>th</sup> day of January, 2003

  
JUDGE PAUL D. LYMAN  
District Court Judge



**EXHIBIT "C"**

**TRIAL TRANSCRIPT, PAGE 214**

1 that proceeds is paid towards the home equity loan, all right?

2 Now, the house and the 401-K are going to be combined  
3 for purposes of getting you two ultimately divorced. The 401-K  
4 loan amount is going to be divided as well. First of all, the  
5 house is awarded to the petitioner, okay, and the 401-K account  
6 is going to be divided, and I'm going to go through how.

7 I'm finding that the \$19,000 debt -- that's the loan  
8 on the 401-K account -- was a marital obligation. Each one  
9 consequently owed \$9,500 of the \$19,000. The respondent will  
10 receive his portion of the house's equity by taking a larger  
11 portion of the 401-K asset.

12 The equity in the house, it -- and this is where it  
13 gets complicated. Once the home equity loan is paid, then  
14 there is no obligation on this house, and both parties co-own  
15 it 50/50. Then each would be entitled to \$50,750.

16 The respondent is awarded the first \$50,750 of his  
17 401-K. In addition to that, he's awarded 9,500 more dollars,  
18 which is the petitioner's portion of the debt that was borrowed  
19 from the 401-K. So he would get the first \$60,250 of the 401-K  
20 money. The balance is split 50/50, and the computation is done  
21 as of today.

22 If the respondent fails to pay his portion of the  
23 equity loan for any reason, including bankruptcy, then the  
24 petitioner is awarded whatever portion he has failed to pay  
25 from the 401-K.

**EXHIBIT "D"**

**TRIAL TRANSCRIPT, PAGE 85**



1 really getting into, Mr. Chuntz, is argument. I can see the  
2 documents. There's no evidence she made any payments the  
3 second year. You've asked that two or three times. I see  
4 where I think you're headed with it, and you know, the claim is  
5 that it's just bogus, okay? But that's argument. She's never  
6 going to admit it. She's just going to stay here and continue  
7 to deny it. So --

8 Q. BY MR. CHUNTZ: When asked by your Counsel how much  
9 money total you took out of the business in the form of cash or  
10 in the form of payments of personal expenses by credit card, I  
11 think your testimony was \$1,000 to \$1,100 a month.

12 A. Uh-huh.

13 THE COURT: Do you want to offer this as an exhibit,  
14 your state -- the account paid?

15 MR. CHUNTZ: Yes.

16 THE COURT: Why don't we do it.

17 MR. CHUNTZ: Move to admit Exhibit 11.

18 THE COURT: Do you have any objection, Mr. Neeley?

19 MR. NEELEY: No.

20 THE COURT: It's admitted.

21 (Exhibit No. 11 received into evidence)

22 Q. BY MR. CHUNTZ: During -- you also indicated that your  
23 business, at least on paper, loses money every year.

24 A. Yes.

25 Q. Do you owe any money on the business right now?

**EXHIBIT “E”**

**TRIAL EXHIBIT “18”, AFFIDAVIT OF MONTHLY EXPENSES**

Howard Chuntz, No. 4208  
Attorney for Respondent  
1149 West Center Street  
Orem, UT 84057  
Telephone: (801) 222-9700

IN THE SIXTH JUDICIAL DISTRICT COURT

SEVIER COUNTY, STATE OF UTAH

SINDY HOLMSTEAD,

Petitioner,

v.

TONY D. HOLMSTEAD,

Respondent.

AFFIDAVIT OF MONTHLY  
EXPENSES

Civil No. 024600016  
Judge Paul D. Lyman

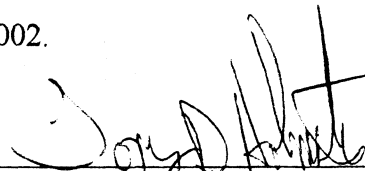
STATE OF UTAH     )  
                              :ss  
COUNTY OF UTAH )

I, Tony D. Holmstead, upon oath duly sworn, state that my ongoing monthly expenses are as follows:

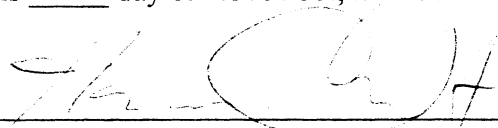
	Currently	After Home Sold or Refinanced	After 5 <sup>th</sup> Wheel Sold	After 401K Loan Split
Rent/mortgage			\$ 800.00	\$ 800.00
Utilities	\$ 138.00	\$ 138.00	\$ 138.00	\$ 138.00
Telephone	\$ 75.00	\$ 75.00	\$ 75.00	\$ 75.00
Maintenance	\$ 25.00	\$ 25.00	\$ 25.00	\$ 25.00
Food and household	\$ 350.00	\$ 350.00	\$ 350.00	\$ 350.00
Clothing	\$ 100.00	\$ 100.00	\$ 100.00	\$ 100.00
Heath insurance	\$ 60.00	\$ 60.00	\$ 60.00	\$ 60.00
Incidentals (gifts,				

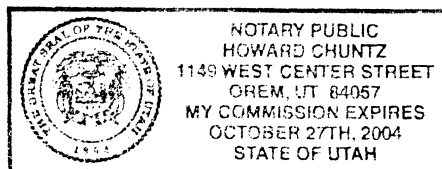
internet, hair care)	\$ 100.00	\$ 100.00	\$ 100.00	\$ 100.00
Entertainment	\$ 150.00	\$ 150.00	\$ 150.00	\$ 150.00
Auto Expense (gas, oil, repairs, ins.)	\$ 200.00	\$ 200.00	\$ 200.00	\$ 200.00
Life insurance	\$ 13.00	\$ 13.00	\$ 13.00	\$ 13.00
Union dues	\$ 68.00	\$ 68.00	\$ 68.00	\$ 68.00
Auto Payment	\$ 743.00	\$ 743.00	\$ 743.00	\$ 743.00
Installment Debt	\$ 400.00	\$ 400.00	\$ 400.00	\$ 400.00
Medical	\$ 137.00	\$ 137.00	\$ 137.00	\$ 137.00
Dental	\$ 25.00	\$ 25.00	\$ 25.00	\$ 25.00
401K loan (for pre- separation stock purchase)	\$ 618.00	\$ 618.00	\$ 618.00	\$ 309.00
Home Equity	\$ 300.00			
Other (5 <sup>th</sup> wheel payment and ins.)	\$ 494.00	\$ 494.00		
Total	\$3,996.00	\$3,696.00	\$4,002.00	\$3,693.00

DATED this \_\_\_\_\_ day of November, 2002.

  
 \_\_\_\_\_  
 Tony D. Holmstead, Respondent

Subscribed and sworn to before me this 5 day of November, 2002.

  
 \_\_\_\_\_  
 Notary Public



**EXHIBIT "F"**

**TRIAL TRANSCRIPT, PAGES 138-139**

1 treated as a withdrawal. He gets nailed with penalties.

2 MR. NEELEY: Okay.

3 THE COURT: How can he -- would he just borrow again  
4 from the 401-K --

5 MR. NEELEY: No, he could pay --

6 THE COURT: -- or would he just cashed in part of his  
7 401-K, incur all of his penalties to pay it off; is that what  
8 you're arguing?

9 MR. NEELEY: No, I'm just asking. I don't know.

10 THE COURT: Because that's the way 401-K's work.  
11 They're all available at the same -- to get the tax benefit,  
12 if he takes the money out of the 401-K to pay a loan to a  
13 401-K, he pays the penalties. I think that's just the law.

14 MR. CHUNTZ: That's our position, too.

15 THE COURT: Yeah, and so if --

16 MR. NEELEY: It's a 10 percent penalty on both loans,  
17 plus the income.

18 THE COURT: Plus the taxes for that year. They tack it  
19 on as if it were the last dollar. So it could be huge.

20 THE WITNESS: Over 25 percent.

21 Q. BY MR. NEELEY: What's the balance on the loan?

22 A. From the 401-K loan?

23 Q. Yes, the 401-K.

24 THE COURT: Okay, go ahead.

25 Q. BY MR. NEELEY: How much is that?

1 A. \$19,000.

2 Q. And you pay \$7,000 a year?

3 A. Well, if you've done the math. I mean, is that right?

4 Q. If you pay \$618 you say you're paying on that.

5 A. Uh-huh.

6 Q. So that will be paid off in three years.

7 A. I guess so. I don't have a calculator in front of me.

8 Q. Well, what is the due date on the loan?

9 A. I don't know.

10 Q. Can you readjust the monthly payment amount?

11 A. No. Not unless I get another loan, and they have  
12 stipulations there on what kind of loans you can get based on  
13 what your previous loans were. I mean, this is a -- you know,  
14 they just don't let you mix and match and mess around with this  
15 thing.

16 Q. Okay.

17 A. It's set. I mean, that's just the way it is. I mean,  
18 it's basically untouchable, unless you feel like you could pay  
19 a huge penalty on it.

20 Q. Well, if this is the amount you're paying, that's you  
21 know, over \$7,000 a year.

22 A. Okay.

23 Q. If you had 19, owed 3 more years, that's 21. I'm  
24 assuming this includes principal?

25 A. It does.

**EXHIBIT "G"**

**TRIAL TRANSCRIPT, PAGE 140**



1 MR. CHUNTZ: Argumentative, your Honor. (Inaudible)  
2 amount of interest there is on it. He can't --

3 MR. NEELEY: Well, I just asked him if this includes  
4 principal, and the answer is he said it did.

5 MR. CHUNTZ: Okay.

6 Q. BY MR. NEELEY: (Inaudible), right?

7 A. As far as I know, yes. It has an interest rate on it.  
8 It's got a calculation on how much money I take a month and  
9 when it will be due.

10 Q. There's no payoff pre-payment penalty if you went out  
11 and got a more conventional loan for \$90,000. You could pay  
12 that loan off at the 401-K; could you not?

13 A. Why would I want to do that?

14 THE COURT: No, no. The answer is "yes" or "no."  
15 Don't say why you don't want to do that, because I see a lot  
16 of good reasons why I ought to order you to do that, okay? So  
17 maybe you ought just answer "yes" or "no." Could you go borrow  
18 that from another source and pay that 401-K loan off?

19 THE WITNESS: No, I could not.

20 Q. BY MR. NEELEY: Now, the next one is the home equity  
21 loan, \$300. You're paying that?

22 A. Yes, it's coming -- it comes right directly out of my  
23 checking account, the Wells Fargo, to pay my Wells Fargo home  
24 equity loan.

25 Q. Is that the total payment of the home equity line, or

**EXHIBIT "H"**

**TRIAL EXHIBIT "28", RETIREMENT ACCOUNT STATEMENT**



## K Plus Plan Account Statement

Employee ID: 0000010085

Employment Status: Active

004704

TONY D. HOLMSTEAD

710 N MAIN

RICHFIELD UT 84701

Here is a summary of your PacifiCorp K Plus Plan account as of September 30, 2002.

### Personal Information

Birth Date	04-04-1952
Original Hire Date	05-08-1978

### Contribution Rate

	Pre-tax
K Plus Plan Elected Rate	6%

### Contributions

Your Post-tax Contributions	\$12.90
Your Pre-tax Contributions	\$48,799.56

### Investment Elections

Fund	Percents
Aggressive Equity	50%
LifePath 2040	50%
<b>Total</b>	<b>100%</b>



delivered by **Hewitt**



## Outstanding Loans

Plan	Effective Date	Outstanding Balance	Scheduled Repayment
K Plus Plan Loan 1	09-18-2000	\$19,241.26	\$308.49
<b>Total</b>		<b>\$19,241.26</b>	<b>\$308.49</b>

## Activity From July 01, 2002 through September 30, 2002

	ScottishPower ADS ESOP	Aggressive Equity	LifePath 2040	Loan Fund
<b>Opening Balance</b>	<b>\$9,126.83</b>	<b>\$30,932.64</b>	<b>\$50,062.53</b>	<b>\$20,566.78</b>
Contributions				
Pre-tax	0.00	485.55	485.52	0.00
Company Match	0.00	375.85	375.84	0.00
Investment Results				
Dividend	190.11	0.00	143.23	0.00
Earnings	143.99	-4,700.48	-8,210.10	0.00
Loan Payment Interest	0.00	262.73	262.69	0.00
Loan Payment Principal	0.00	662.77	662.75	-1325.52
Withdrawals/Distributions	-190.11	0.00	0.00	0.00
<b>Closing Balance</b>	<b>\$9,270.82</b>	<b>\$28,019.06</b>	<b>\$43,782.46</b>	<b>\$19,241.26</b>
Closing Units	1444.779963	2078.565081	3843.939111	
Price	6.416769	13.480000	11.390000	
Equivalent Shares	426.244598			
Stock Price	21.750000			

	<b>Total</b>
<b>Opening Balance</b>	<b>\$110,688.78</b>
Contributions	
Pre-tax	971.07
Company Match	751.69
Investment Results	
Dividend	333.34
Earnings	-12,766.59
Loan Payment Interest	525.42
Loan Payment Principal	0.00
Withdrawals/Distributions	-190.11
<b>Closing Balance</b>	<b>\$100,313.60</b>

### Closing Balance By Account (Excludes Loan Fund)

	<b>TOTAL</b>
Pre-tax	\$44,671.25
Prior Co Match	\$25,891.34
Post-tax	\$155.00
Company Match	\$10,354.75
<b>Total</b>	<b>\$81,072.34</b>

As of September 30, 2002 you were 100% vested in the company matching account. Your vested account balance was \$81,072.34.

### For More Information

If you need additional information, access the *Your Benefits Resources*™ Web site at <http://resources.hewitt.com/pacificorp> or call the PacifiCorp K PlusLine toll-free at 1-800-241-7587 at any time. PacifiCorp Benefits Center representatives are available between 7:00 a.m. and 4:00 p.m., Pacific time, Monday through Friday.



**EXHIBIT "T"**

**TRIAL TRANSCRIPT, PAGES 216-218**

1 because they reflect food that she bought and things like that.

2 In addition to that I've also ordered her to pay off  
3 her credit card debt so she's debt free, which would further  
4 reduce that \$320 item, but I've ordered her to pay \$150 on the  
5 home equity loan, which she didn't expect to have to pay off,  
6 in order to -- now, in order to help her attain the standard  
7 of living that she enjoyed during the course of the marriage,  
8 which was described and is unrefuted as she didn't have to  
9 worry about money at all, I find that the \$2,092 that she's  
10 claimed is reasonable, even though I'm doing the fiddling with  
11 the installment account portion of her expenses.

12 I still think it's reasonable. She's been scrimping  
13 and saving. That was the testimony. She shouldn't have to  
14 scrimp and save. She should be able to enjoy a similar style  
15 to what she had enjoyed. That leaves her shortfall at \$992.

16 His income is undisputed. The gross income is \$5,387  
17 a month. After taxes it's \$3,631, and there was no real  
18 dispute with regard to that. Two of the expenses of the  
19 respondent are unreasonable. First, the truck payment will not  
20 be counted. Its purpose, the Court has already found, was to  
21 attempt to have him not have to pay alimony. Consequently it's  
22 to be sold immediately and I won't count it as an expense.

23 In addition, the 401-K loan payment of \$618 a month is  
24 clearly excessive. It will pay off the loan in a very short  
25 period of time. The respondent's Counsel opined that the

1 petitioner could go out and get a refinance of his -- of the  
2 respondent's \$50,000 share of the loan -- of the value in the  
3 home at about \$300 a month or less.

4           Based on that opinion, extrapolating out the \$19,000  
5 loan, the petitioner ought -- the respondent ought to be able  
6 to get this \$19,000 refinanced at roughly \$120 a month or  
7 something like that. Now, I don't know whether he can actually  
8 do it or not, but that's what they propose, and I think \$120 a  
9 month to pay off that is far more reasonable than the \$618 a  
10 month.

11           There also is a clear question in the Court's mind of  
12 whether or not the payment is \$308 per month. When I look at  
13 that last document that was introduced, I think it's \$308 a  
14 month. However, I know that the respondent -- and I respect  
15 your difference. He claims it's the higher amount.

16           In any case, he's ordered to work some -- either go  
17 get a loan from somebody else and pay that \$19,000 off, or to  
18 work something out with his own 401-K. He can do it whichever  
19 way he feels like, but it's to be refinanced and he's to reduce  
20 that amount.

21           Consequently, if we do that, and I use the column  
22 that he has labeled "after the fifth wheel sold" column on  
23 his Exhibit 18 -- now, that includes \$400 a month he's paying  
24 towards these credit card debts, and I'm awarding him all the  
25 credit card debt that he said that he would be willing to pay



1 that were his. That means we take off the \$743 truck payment,  
2 we take the \$618 401-K payment. We add to it the \$120 a month  
3 401-K refinance payment, and the \$150 a month home equity  
4 payment. His expenses then become \$2,911.

5 When I deduct \$2,911 from \$3,631, which is his income  
6 after taxes, the amount that he can pay towards alimony is \$720  
7 a month. As I said, I think her expenses were very reasonable,  
8 and I fiddled with hers. I'm going to order him to pay the  
9 \$720 a month as alimony in this particular case.

10 The petitioner earns \$1,100 a month gross. The  
11 respondent earns \$5,387. Clearly in my mind she has very  
12 little ability to pay a \$3,500 attorney's fee. I am awarding  
13 the petitioner a judgment against the respondent for \$3,500.  
14 The \$1,500 she already paid, we've taken that into account,  
15 but the \$3,500 I'm awarding.

16 I think I've covered everything according to my notes.  
17 Mr. Neeley, are there anything --

18 MR. NEELEY: One more thing. I think we stipulated,  
19 your Honor, that the mountain property should be sold  
20 immediately and the proceeds split.

21 THE COURT: Yes, that was part of -- that was one  
22 of the initial stipulations. That's why I didn't bring it up  
23 here. Anything else you want me to make findings on? Anything  
24 else you have questions about?

25 MR. NEELEY: Just so I make sure. You specifically